

long term lease a short term occupancy, the lessee's leasehold estate is not destroyed and his obligation to pay rent continues; only where the whole estates of the landlord and of the tenant are absolutely extinguished by a condemnation does the tenant's obligation to pay rent cease. (R. 60-69.)

Although petitioner asserts that some unspecified "immunity" against operation of these rules is contained in the Second War Powers Act, a reading of the Act (see Appendix to Petition) will disclose no trace or purport of such "immunity." Petitioner's claim of a Federal "immunity" is not even colorable.

(2) Even if it be assumed that a Federal question might have been involved, it was not properly raised or preserved in the State Courts.

Petitioner's answer (R. 40-1) did not specially set up or plead any Federal statute or "immunity" as a defense. The opinions of both the Appellate Court (R. 46-58) and the Supreme Court (R. 60-69) demonstrate that the case was presented as one to be decided under the common law of Illinois.

ARGUMENT.

The Sole Question Involved Is One of State Law.

The only question presented is whether petitioner, a lessee, is bound by its covenant to pay rent during the time that the exclusive possession and temporary use of the demised premises were taken by the Government under a condemnation proceeding pursuant to the Second War Powers Act (Ch. 199, Title II, Sec. 201, 56 Stat. 177, Title 50 U. S. C. A. App. Sec. 632). Petitioner is lessee of the premises for a term running from December 1, 1926 to November 30, 1946 (R. 5). The Government condemned the temporary use from March 11, 1943 to June 30, 1944, with the right to extend the term of the condemnation for additional yearly periods (R. 40, 41).

Petitioner asserts as a basis for jurisdiction of this Court under Sec. 237(b) of the Judicial Code, that the State Courts have denied it an "immunity" under the Second War Powers Act. However, the petition fails to quote any words or section of that Statute which even purport to create or to confer the supposed "immunity."

The particular immunity claimed in the present case is immunity from petitioner's covenant to pay rent. A mere reading of the Second War Powers Act shows that it does not attempt to declare that a tenant shall be relieved from performing his covenant to pay rent while the Government is in temporary possession. Petitioner has not been denied any immunity conferred by the Second War Powers Act because the Statute has not conferred any, and petitioner's contention that it has been denied one is not even colorable. As said by this Court in *Iowa v. Rood*, 187 U. S. 87, 92:

"The mere fact that the plaintiff in error asserts title under a clause of the Constitution, or an Act of

Congress, is not in itself sufficient, unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage."

The Second War Powers Act not having attempted to legislate on the effect of a taking thereunder upon existing landlord-tenant relationships, it follows, according to *Erie Railroad v. Tompkins*, 304 U. S. 64, 78, that "the law to be applied * * * is the law of the State."

In this case, the Supreme Court of Illinois merely confirmed the correctness of the assumption made by this Court in *United States v. General Motors Corporation*, 323 U. S. 373, that the tenant is still obligated to pay rent where less than the remainder of his term is taken in the condemnation proceedings. That case originated in a Federal District Court in Illinois and the rules laid down by the Court to determine the value of the tenant's occupancy are premised on the proposition that the tenant is bound to continue to pay rent during the time the Government is in temporary possession. There is nothing in the case of *United States v. Petty Motor Company*, cited by petitioner (decided February 25, 1946), which involved a complete taking of the entire interest of the tenants, which in any way modifies the *General Motors* case.

The cases cited by petitioner to sustain jurisdiction are not even remotely in point. Two of them involved assertions of rights under Federal Court judgments, while the others involved rights asserted under certain Acts of Congress. No Act of Congress in this case even purports to confer any rights or immunity on petitioner.

Even if the Assumption Be Made That This Case Might Have Involved a Federal Question, Petitioner Did Not Properly Raise or Preserve It in the State Courts.

In the jurisdictional statement at page 7, petitioner asserts that it specially set up and claimed an immunity under the Second War Powers Act in the Trial Court. That assertion is utterly without foundation. The record shows that all that petitioner did was to plead *inter alia* that because the Government had taken temporary possession for a stated period pursuant to unspecified "Federal Statutes," "defendant was evicted by paramount right from the entire premises, * * *" that the relation of landlord and tenant was thereby abrogated, and the "lease was terminated by operation of law" (R. 40-41). This is nothing more than an assertion that under the common law of Illinois it was not liable to respondents because of the *facts* pleaded.

Petitioner made no assertion in the Illinois Courts that it was claiming any right, privilege or immunity under the Second War Powers Act. This case has been presented through all three Courts of Illinois simply as one where the exercise of the sovereign power of eminent domain had interfered with the normal lessor-lessee relationships. Whether that power was exercised by the Federal or State sovereignty was a matter of no consequence. No special "immunities" or "privileges" were alleged or argued to have arisen because the condemnation was Federal rather than State.

The opinions of the Appellate Court (R. 46-58) and the Supreme Court (R. 60-69) demonstrate that petitioner never asserted any more than that because of the *fact* that the Government, acting within its statutory authority, had condemned a portion of the leasehold, petitioner was not

liable to pay rent. Petitioner never asserted in the State Courts that the Second War Powers Act itself conferred an immunity on petitioner. As stated by this Court in *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 653: "For aught that appears the State Court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

The averments in petitioner's answer do not meet the tests of "specially set up or claimed" laid down by this court. Thus, in *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, this Court said:

"The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights, the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially' that is, unmistakably, this court is without authority to re-examine the final judgment of the State Court. This statutory requirement is not met if such a declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

Petitioner has printed in the record a complete copy of its petition for rehearing in the Supreme Court of Illinois (R. 71-74). Even if the petition for rehearing could be construed as raising a Federal question, it was obviously too late. It is well settled that Federal questions first presented in a petition for rehearing to the highest Court in the State are not timely raised unless the State Court actually entertains the petition and expressly passes upon the Federal questions (*Godchaux Co. v. Estopinal*, 251 U. S. 179, 181; *McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 347).

But even the petition for rehearing does not show that petitioner was asserting that any provision of the Second

War Powers Act relieved it of its obligation to pay rent. All petitioner asserted was that the decision of the Supreme Court of Illinois was contrary to the common law decision of this Court in *Gates v. Goodloe*, 101 U. S. 612.

WHEREFORE, respondents respectfully pray that the petition for a writ of certiorari be denied.

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